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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DENISE EMERSON, Plaintiff and Respondent, v. WILLIAM POWERS, Defendant and Appellant.	2d Civil No. B269529 (Super. Ct. No. 15CVP-0299) (San Luis Obispo County)

William Powers appeals from an order denying his special motion to strike a civil harassment petition under Code of Civil Procedure section 425.16,[1] the anti-SLAPP (strategic lawsuit against public participation) statute. The petition, filed by appellant's neighbor, respondent Denise Emerson, seeks to enjoin appellant from harassing, intimidating, stalking and annoying respondent and her husband, Philip Emerson. We conclude the trial court properly denied the motion to strike

[1] All further statutory references are to the Code of Civil Procedure.

because appellant's alleged conduct does not qualify as protected activity under the anti-SLAPP statute. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On September 29, 2015, respondent filed a request for a temporary restraining order (TRO) against appellant. She also filed a request for a TRO against appellant's girlfriend, Lindsey Keyes. Respondent alleged, among other things, that appellant has been "harassing, intimidating, stalking, and annoying [respondent and her husband] for approximately seven months. The harassment includes yelling profanities at [respondent and her husband] whenever they walk out of their home, stalking and watching [them] on their property with surveillance equipment aimed in their private yard, making obscene gestures when [they] walk outside their home or drive by [appellant's] home, making false statements to [respondent's] employer in an attempt to get her fired, purposefully annoying [respondent and her husband] by playing music extremely loud (even when not home), filming [them] whenever they leave their home, and persistently driving by their home, on the dirt road located directly in front of their house, and 'burning out' in order to kick up dust while playing music at extremely high levels."

The trial court issued a TRO against appellant on September 29, 2015, and set an evidentiary hearing on respondent's petition for a civil harassment restraining order. The court also issued a TRO against Keyes and, following an evidentiary hearing, entered a civil harassment restraining order against Keyes for a period of two years.

Before the trial court could hear respondent's petition for a civil harassment restraining order against appellant, he filed an anti-SLAPP motion to strike the petition under section 425.16. Appellant, who is self-represented, argued that the

gravamen of respondent's petition is to enjoin him "from playing his music while farming and from making statements to others about [respondent]," and that these activities "are constitutionally protected under [section] 425.16 because . . . he has a constitutional and statutory right to pursue his farming profession and the right to farm is an issue of public importance."

The trial court denied the anti-SLAPP motion. It determined that appellant's "claimed right to play loud music while pursuing his farming activities is not constitutionally protected activity." The court observed that "the focus of the action is to restrain [appellant] from continuing to harass, intimidate, and annoy [respondent]. It is not to enjoin [appellant] from pursuing his agricultural interest." The court further concluded that "the allegations being made against [appellant] do not constitute activity connected with a public issue or an issue of public interest as they do not involve a person or entity in the public eye, do not affect large numbers of people beyond the direct participants, or involve a topic of widespread public interest." This appeal followed.[2]

DISCUSSION

The Anti-SLAPP Statute and the Standard of Review

"A SLAPP suit has been described as 'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" (*Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 672.) The anti-SLAPP statute was a response to the pervasive use of these suits "to discourage citizens from seeking

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[2] Respondent elected not to file a brief. Because no respondent's brief was filed, the appeal will be decided based on the record presented, appellant's opening brief and the argument made by appellant at the hearing. (Cal. Rules of Court, rule 8.220(a)(2).)

governmental action." (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 14.) The statute provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

For a cause of action to be subject to a motion to strike under section 425.16, the defendant must make a threshold showing that the cause of action against the defendant is one "arising from any act of that [defendant] in furtherance of the [defendant's] right of petition or free speech . . . ." (§ 425.16, subd. (b)(1).) If the cause of action does not meet this threshold criterion, it is not subject to a motion to strike and the court never reaches the issue of whether the plaintiff can show a probability of success on the merits. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76, 80-81 (*City of Cotati*).)

Anti-SLAPP motions may challenge petitions for civil harassment restraining orders because such petitions are "causes of action" under section 425.16. (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 647-651 (*Thomas*).) Thus, it was appellant's burden to show that respondent's petition arose from activity protected under that statute. (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th. 53, 67.) This burden is met by "'demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e). . . .'" (*City of Cotati*, *supra*, 29 Cal.4th at p. 78.) There are four categories of protected activities under that subdivision: "'(1) any written or oral statement or writing made

before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.'" (*Thomas*, *supra*, 126 Cal.App.4th at pp. 644-645, quoting § 425.16, subd. (e)(1)-(4).)

We review de novo the order denying appellant's anti-SLAPP motion. (*Thomas*, *supra*, 126 Cal.App.4th at p. 645.) We "apply our independent judgment to determine whether [the petition] arose from acts by [appellant] in furtherance of [his] right of petition or free speech in connection with a public issue." (*Ibid*.) In so doing, we consider respondent's petition, as well as the supporting and opposing declarations. "However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to [respondent] [citation] and evaluate [appellant's] evidence only to determine if it has defeated that submitted by [respondent] as a matter of law.' [Citation.]" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

Respondent's Petition Does Not Arise from Protected Conduct

Appellant contends the harassment alleged by respondent in her petition is protected under the anti-SLAPP statute. Specifically, he maintains the alleged conduct was protected under section 425.16, subdivision (e)(4), which applies to "any . . . conduct in furtherance of the exercise of . . . the

constitutional right of free speech in connection with a public issue or an issue of public interest." We are not persuaded.

To qualify as a public interest, the matter should be of concern to a substantial number of people; there should be a "degree of closeness" between the challenged statements or conduct and the asserted public interest; and the focus of the conduct should be the public interest, not a private controversy. (*Hailstone v. Martinez* (2008)169 Cal.App.4th 728, 736; see *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479 ["The definition of 'public interest' within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity"].)

"In assessing whether a cause of action arises from protected activity, "'we disregard the labeling of the claim [citation] and instead 'examine the principal thrust or gravamen of a plaintiff's cause of action.'"'" (*Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1520, italics omitted.) "We assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' [Citation.] If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute." (*Ibid.*)

Here, appellant asserts that the gravamen of respondent's petition is that she "objects to music [appellant] plays while farming at the farm next to her home, things he says to her, things he says to others about her, and other self-expressive actions she alleges he takes, to say something to or

about her." Appellant fails to demonstrate, however, how these actions involve a public issue or an issue of public interest. He contends that the public interest is the threat to his farming activities, but respondent's petition does not seek to stop these activities. It requests that he have no contact with respondent or her husband, that he be limited to playing music within the established standards of the San Luis Obispo County noise ordinance and that he be prevented from driving any vehicle on the road located in front of respondent's home. As the trial court aptly observed, "[t]his is a private dispute between neighboring property owners." There is no evidence the activities received any "public" attention at all or were a concern to a substantial number of people.

Furthermore, notwithstanding appellant's argument to the contrary, respondent's petition is not based on mixed protected and non-protected activity. (See *Baral v. Schnitt* (2016) 1 Cal.5th 376, 392 ["But when the defendant seeks to strike particular claims supported by allegations of protected activity that appear alongside other claims within a single cause of action, the motion cannot be defeated by showing a likelihood of success on the claims arising from unprotected activity"].) The petition arises entirely from appellant's unprotected activities.

Because we conclude that appellant did not meet his initial burden of showing his alleged conduct was constitutionally protected, we do not reach the second step of the anti-SLAPP analysis of whether respondent demonstrated a sufficient probability of prevailing on her harassment petition. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89; *Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal.App.4th 1108, 1118-1119.) Nor do we reach appellant's various challenges to the merits of respondent's petition. Those issues are not before

us. Not only is appellant's appeal strictly from the order denying the anti-SLAPP motion, but the trial court has yet to consider the merits of respondent's petition. (See, e.g., *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1969) 275 Cal.App.2d 732, 735 ["[U]ntil the trial court completes its decisional process, an appeal is premature"].)

DISPOSITION

The order denying the special motion to strike is affirmed. Respondent shall recover her costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Barry T. LaBarbera, Judge
Superior Court County of San Luis Obispo

William Powers, in pro. per., for Defendant and Appellant.

Pick Law Office and Michael R. Pick Jr., for Plaintiff and Respondent.